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NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(San Joaquin)

THE PEOPLE, Plaintiff and Respondent, v. STEVEN PAUL PACHECO, Defendant and Appellant.	C068463 (Super. Ct. No. MF033028A)

A jury convicted defendant Steven Paul Pacheco of being a convicted felon in possession of a firearm (former Pen. Code, § 12021, subd. (a)[1] [now § 29800, subd. (a)]—count 5), being a convicted felon in possession of ammunition (former § 12316, subd. (b)(1) [now § 30305, subd. (a)]—count 6), assault with a firearm (§ 245, subd. (a)(2)—count 9) and three counts of home invasion robbery in concert (§ 211—counts 1

[1] Undesignated statutory references are to the Penal Code.

(Charles McFerren), 2 (Wanda McFerren), 3 (Erica McFerren)).[2] The jury found numerous firearm enhancements to be true (§§ 12022.53, subds. (b), (c)), 12022.5, subd. (a)).[3]

Sentenced to state prison for a term of 36 years eight months, defendant appeals, contending insufficient evidence supports his conviction on counts 3 (robbery of Erica), 5 and 6. We shall affirm the judgment.

FACTUAL BACKGROUND

About 5:00 a.m. on June 26, 2010, Charles woke up on the living room sofa in his home in Manteca and walked towards the bathroom when he was accosted at gunpoint by a man, later identified as defendant, wearing dark clothes, a ski mask, and gloves. Charles grabbed defendant by the throat and pinned him against the wall. Another man, thinner than defendant and also wearing a ski mask and gloves, pointed a gun at Charles's head and threatened to kill him if he did not release defendant. Charles did so and was ordered to the floor. As Charles started to get down, he was kicked by both men who were then approached by the family dog. Charles's spouse, Wanda, who had also fallen asleep in the living room, woke up. Wanda was ordered to put the dog outside or the dog would be shot. After she did so, the men ordered the McFerren couple onto the living room floor. Defendant asked whether there were others in the house. Charles denied it but defendant ran up the stairs to the room of the couple's daughter, Erica, while the thinner man held the couple at gunpoint.

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[2] The McFerrens will be referred to by their first names to avoid confusion.

[3] Count 4, first degree burglary, was dismissed at trial in the interests of justice on the People's motion.

Antonio Jose Bettencourt, Erica's then boyfriend, came out of Erica's room and defendant ordered him to the floor.[4] Bettencourt smirked as he did so. Defendant than ran downstairs and started to go through the kitchen drawers.

Bettencourt knew that Wanda kept her jewelry in the kitchen and that Charles kept cash in a wine box referred to as the "globe." At the time of the robbery, Charles had about $5,000 in the globe.

Defendant asked whether there was more cash in the house and told the thinner man to shoot Charles if he did not answer. Charles faked a heart attack and the thinner man told defendant to hurry. Bettencourt then informed the thinner man, " 'You guys got company coming.' "

The thinner man ran out the front door and fired his gun. Defendant asked Wanda where her rings were. She had hidden them under a cushion. Defendant took a necklace Wanda was wearing. In response to defendant's demand for jewelry and his wallet, Charles showed defendant that he did not have any money in his wallet and defendant grabbed several cards. Defendant ran out the front door and Charles gave chase. Charles noticed that defendant's mask was on top of his head, his face was exposed and that he was carrying a black backpack. When defendant reached a corner, he turned and fired his gun at Charles who jumped in the grass behind a tree but was undeterred in his pursuit.

Shortly thereafter, police officers stopped defendant who had thrown a handgun onto the ground and was taking off his right-hand glove. He was wearing black clothing

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[4] Codefendant Antonio Jose Bettencourt was also charged with the three home invasion robbery counts (counts 1-3) and first degree burglary (count 4) as well as being a convicted felon in possession of a firearm and ammunition (counts 7, 8). It was also alleged that a principal was armed. Bettencourt's trial was severed from defendant's trial.

and had a beanie with two holes cut out of it covering his forehead. He was carrying a black backpack.

Charles turned onto the street where officers had stopped defendant and saw officers put defendant into a patrol car.

Erica testified that she had met defendant on two or three occasions during her 21-month relationship with Bettencourt. In the afternoon on the day before the robbery, defendant spent some time at Bettencourt's San Leandro apartment with Bettencourt and Erica. Erica observed defendant take things out of a backpack including a pair of pants with the words "Bay Area" on the front of one leg and red pockets on the back. Later that evening, Erica returned to her parent's home. Bettencourt arrived later.

The morning of the robbery, Erica woke up hearing the family dog barking. She woke up Bettencourt and said an intruder was in the house. When she heard Charles making noise, she went to her bedroom door, looked downstairs, and saw a man, she later identified as defendant, wearing black clothes and a mask. She went for her gun but it was missing and told Bettencourt. She had previously shown the gun to Bettencourt and had last seen her gun the month before when she had put it in its case next to her bed with one bullet in the clip.

Bettencourt walked out of Erica's bedroom and got on the floor. Defendant walked to the other rooms on the floor and returned to Erica's bedroom, ordering Erica and Bettencourt to lie down on the bed. Defendant was wearing the "Bay Area" pants and pointing Erica's gun at her. At that point, Erica thought defendant was the gunman. When defendant went back downstairs, Erica asked Bettencourt what defendant was doing in her house and told him to call defendant's phone. Bettencourt sent a text to defendant stating, "It's bad, call." Erica called 911 and, within a minute, heard a gunshot.

During the robbery, Erica was afraid for her life and those of others. Items including her debit card and $140 in cash had been stolen from her purse, which she had left in the kitchen on the counter.

When interviewed by an officer at the scene, Erica claimed she did not get a good look at either robber, did not mention defendant as a possible suspect or that she recognized his pants, and did not reveal she told Bettencourt to call defendant or that defendant was holding her gun. The officer explained that he had not formally interviewed Erica at the scene and only spoke to her to determine how many suspects were involved. When interviewed by a detective at the police department the morning of the robbery, Erica noted the distinctive mark on the pants but did not state that she had previously seen them. When she heard defendant's description, which included tattoos, she told the detective that she suspected it was defendant but again did not reveal that the gun he was holding was hers.

The gun recovered from defendant belonged to Erica but the .40-caliber hollow-point bullets found in the chamber and magazine did not belong to her. A search of defendant revealed Erica's debit card, a .40-caliber magazine loaded with hollow-point bullets, $4,438 in cash, three knives, and Wanda's necklace. A search of defendant's backpack revealed numerous items belonging to Wanda and Charles. At the corner where defendant had fired at Charles, officers found an expended .40-caliber shell casing of the same type found in defendant's possession and Wanda's wristwatch and bracelet. When Charles stated to the police that the robbers stole his money, Bettencourt asked, "Was it in the globe box?" Bettencourt and Eric Sevilla were arrested at some later date.

The parties stipulated that in 2004 defendant was convicted of a felony in Colorado (attempted trespass of an automobile with intent to commit a crime).

DISCUSSION

I. Sufficiency of the Evidence of Force or Fear

Defendant contends his conviction for robbery in count 3 must be reversed because insufficient evidence shows that he used force or fear against Erica. Defendant argues that Erica's gun was not taken by force or fear because she was sleeping when it was taken. Defendant argues items taken from Erica's purse in the kitchen were not taken by force or fear because Erica did not know the items were missing until some later time. Further, defendant claims that the items were not taken from Erica's immediate presence nor was she overcome by force or violence. We conclude sufficient evidence supports his conviction.

" 'In reviewing the sufficiency of evidence under the due process clause of the Fourteenth Amendment to the United States Constitution, the question we ask is "whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." ' [Citations.] We apply an identical standard under the California Constitution. [Citation.] 'In determining whether a reasonable trier of fact could have found defendant guilty beyond a reasonable doubt, the appellate court "must view the evidence in a light most favorable to respondent and presume in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence." ' " (*People v. Young* (2005) 34 Cal.4th 1149, 1175 (*Young*).)

"In deciding the sufficiency of the evidence, a reviewing court resolves neither credibility issues nor evidentiary conflicts. [Citation.] . . . Moreover, unless the testimony is physically impossible or inherently improbable, testimony of a single witness is sufficient to support a conviction." (*Young*, *supra*, 34 Cal.4th at p. 1181.)

"Robbery is the felonious taking of personal property in the possession of another, from his person or immediate presence, and against his will, accomplished by means of force or fear." (§ 211.)

"The fear mentioned in Section 211 may be either: [¶] 1. The fear of an unlawful injury to the person or property of the person robbed, or of any relative of his or member of his family; or, [¶] 2. The fear of an immediate and unlawful injury to the person or property of anyone in the company of the person robbed at the time of the robbery." (§ 212.)

"[R]obbery, like larceny, is a continuing offense," requiring both "caption" (achieving possession of the property) and "asportation" (carrying the property away), and aggravating factors ("force or fear" and "person or immediate presence"); the elements of the offense need not occur in any particular order. (*People v. Gomez* (2008) 43 Cal.4th 249, 254-255 (*Gomez*).) If defendant uses force or fear to take or retain stolen property before completing its asportation by reaching a place of temporary safety, the element of "by means of force or fear" has been met. (*Id*. at pp. 254, 255-258.)

" '[I]mmediate presence' is 'an area over which the victim, at the time force or fear was employed, could be said to exercise some physical control' over his property. [Citation.] 'Under this definition, property may be found to be in the victim's immediate presence "even though it is located in another room of the house . . . ." ' " (*Gomez, supra,* 43 Cal.4th at p. 257.) Case law has " ' "focused on whether the taken property was located in an area in which the victim could have expected to take effective steps to retain control over his property." ' " (*Id*. at pp. 257-258.) "If the 'immediate presence' element arises not at caption but during asportation," the crime is still a robbery. (*Id*. at p. 258.)

Here, there was sufficient evidence from which the jury could find that defendant used force to retain Erica's gun and was in her immediate presence when he pointed the

gun at her. He then went to the kitchen and stole items from Erica's purse. She did not follow defendant down the stairs to the kitchen. She testified she was in fear for her life and the lives of others. Defendant's use of force against Erica discouraged her from preventing the theft of the items from her purse, which was in her "immediate presence" even though located in another room of the house.

Defendant does not challenge the other elements of count 3. Substantial evidence supports defendant's conviction on count 3.

II. Evidence of a Previous Felony Conviction

Defendant contends his convictions on counts 5 and 6, being a convicted felon in possession of a firearm and ammunition, respectively, must be reversed because there is insufficient evidence that he had previously been convicted of a felony. Defendant argues that there was insufficient evidence because the 2004 Colorado felony conviction for attempted trespass of an automobile with the required intent does not match the 2008 California felony conviction for receiving stolen property, which was alleged in the amended information. Defendant suggests that "[t]he record indisputably establishes that the stipulation was entered in error of some kind, as shown by comparing the allegation appearing in the [amended] information with the stipulation as read into the record by the prosecutor." Defendant speculates whether defendant "ever intended to stipulate to the offense which the prosecutor read into the record" since the offense was not the same as alleged and that "the presence of such significant deviations between the charging document and the stipulation casts doubt on whether—assuming there was a prior conviction—it was for a felony, or a misdemeanor." We conclude that defendant's stipulation conclusively proved the element and that the discrepancy was waived by defendant's stipulation.

Prior to trial, defendant and the prosecutor stipulated that defendant had a prior felony conviction. Defense counsel wanted "the jury to know what it was so they don't speculate it's something horrendous."

During trial, the parties' stipulation was read to the jury, that is, "defendant, Steven Pacheco, was convicted of attempted trespass of an automobile with intent to commit a crime, a felony, in the State of Colorado." The stipulation was "signed by all parties, including defendant." For purposes of counts 5 and 6, the jury was instructed that the stipulation meant that the jury had to accept the fact of defendant's prior felony conviction as proved. Thus, defendant's prior felony conviction for purposes of counts 5 and 6 was conclusively proved. It is "settled that a party is bound by a stipulation or admission in open court of his counsel, and, except where a constitutional proscription is involved, he cannot mislead the court by seeming to take a position on the issues and then disputing or repudiating the position on appeal." (*In re Francis W.* (1974) 42 Cal.App.3d 892, 903.)

We discuss the following to forestall a claim of ineffective assistance of counsel on habeas. Defendant never challenged his stipulation or claimed he had entered it as a result of a mistake. "Either party may move the court to be relieved from the binding effect of a stipulation previously entered into, and it is within the sound discretion of the trial court whether or not such relief should be granted; in this regard the decision of the trial court will not be disturbed by an appellate court absent an abuse of discretion. [Citations.] The grounds upon which the trial court may exercise its discretion are that the stipulation was entered into as the result of fraud, misrepresentation, mistake of fact, or excusable neglect [citations], that the facts have changed, or that there is some other special circumstance rendering it unjust to enforce the stipulation." (*People v. Trujillo* (1977) 67 Cal.App.3d 547, 554-555.)

The record fails to support any of the above grounds for relief from the stipulation.

An amended complaint filed July 1, 2010, against defendant and Eric John Sevilla, alleged that defendant's prior conviction for purposes of both the possession of the firearm and ammunition counts was the 2004 Colorado *felony* conviction of first degree trespass of an automobile. An amended complaint filed on August 18, 2010, against defendant, Sevilla, and Bettencourt, alleged that defendant's prior for purposes of both the possession of the firearm and ammunition counts was the 2004 Colorado felony conviction of first degree trespass on an automobile. Notably, this amended complaint alleged that Bettencourt's prior for purposes of the possession of firearm count against him (count 8) was a 2008 California receiving known stolen property (§ 496, subd. (a)) and the prior against him for purposes of the unlawful possession of ammunition count (count 9) was a section "496[d,] [subdivision (a)]."

At the preliminary hearing, the prosecutor provided a certified rap sheet showing defendant's 2004 Colorado conviction for "felony trespassing on an automobile with intent to commit a crime." The magistrate held defendant to answer for the counts charging that defendant was a convicted felon in possession of a firearm and ammunition.

An information was filed and later an amended information charging both Bettencourt and defendant. Both Bettencourt and defendant were charged with being a convicted felon in possession of a firearm and ammunition with Bettencourt's prior felony conviction alleged to be a 2008 California receiving stolen property offense. Defendant's prior felony conviction was also alleged in the information and the amended information to be a 2008 California receiving stolen property with the same case number as Bettencourt's. Bettencourt's trial was later severed.

We have combed the record and have not found any indication that the parties were aware of the pleading discrepancy, that is, the information and the amended information alleged defendant's prior to be Bettencourt's prior and not the 2004 Colorado felony, which had been alleged in the two amended complaints and used to hold

defendant to answer at the preliminary hearing. The discrepancy was waived when defendant stipulated to his prior felony conviction.

Defendant does not challenge the other elements of counts 5 and 6. Sufficient evidence supports his conviction on both counts.

DISPOSITION

The judgment is affirmed.

BUTZ, J.

We concur:

NICHOLSON, Acting P. J.

MURRAY, J.